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No. 99-1347

In the Supreme Court of the United States

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether California almond handlers may, consistent with the First Amendment, be required to fund a generic advertising and promotion program for almonds and almond products under an agricultural marketing order that is similar to, but more flexible than, those upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 192 F.3d 1272. The opinion of the district court (Pet. App. 12a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1999. A petition for rehearing was denied on November 12, 1999 (Pet. App. 275a). The petition for a writ of certiorari was filed on February 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Almond handlers (*i.e.*, processors and distributors) in the State of California are regulated by a marketing order promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* The AMAA was enacted "in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461 (1997) (citing 7 U.S.C. 602(1)).

The AMAA authorizes the Secretary of Agriculture to issue marketing orders for certain commodities, including almonds. 7 U.S.C. 608c(1) and (2). Such marketing orders may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). They may also provide for "production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). Those projects may—with respect to certain commodities, such as almonds—include "paid advertising." *Ibid.* The projects are funded by mandatory assessments on handlers. *Ibid*; see also 7 U.S.C. 610(b)(2)(ii) (handlers shall pay assessments equal to their pro rata share of expenses of administering marketing orders). The Act provides that the marketing orders for almonds and a few other commodities may authorize a handler to receive credit against its assessment for amounts that it spends on certain advertising of its own. 7 U.S.C. 608c(6)(I).

Before promulgating a marketing order for a commodity, the Secretary of Agriculture must conduct a

formal rulemaking proceeding and, in most cases, obtain approval of the marketing order either from two-thirds of the producers of the commodity covered by the order or from the producers who market two-thirds of the volume of the commodity. 7 U.S.C. 608c(8). The marketing order is administered by a committee, which generally is composed of producers and handlers of the commodity, under the supervision of the Secretary. 7 U.S.C. 608c(7)(C), 610. The Secretary appoints the members of the committee and may remove them at any time. See, *e.g.*, 7 C.F.R. 981.33 and 981.40(d) (relating to the Almond Board of California). The committee recommends an annual budget for administering the marketing order, which may include expenditures for advertising and other promotional activities. The Secretary may accept or reject the recommended budget. 7 U.S.C. 608c(12); 7 C.F.R. 981.38, 981.41. After adopting a budget, the Secretary promulgates a regulation prescribing assessments on handlers to fund the budgeted activities. See 7 U.S.C. 610(c); 7 C.F.R. 981.41(e), 981.80, 981.81(a).

A marketing order must be discontinued in either of two situations. The Secretary of Agriculture must terminate or suspend a marketing order if he finds that it "obstructs or does not tend to effectuate the declared policy" of the AMAA. 7 U.S.C. 608c(16)(A)(i). The Secretary also must terminate a marketing order if he determines that a majority of the producers do not support it. 7 U.S.C. 608c(16)(B).

2. This case concerns the marketing order for California almonds, which is administered by the Almond Board of California, a committee of almond growers and handlers appointed by the Secretary of Agriculture. 7 C.F.R. Pt. 981. Four members of the Almond Board are nominated by cooperative growers

and handlers, four are nominated by independent growers and handlers, and two are nominated by whichever group accounts for more than 50 percent of almonds delivered or handled during the current crop year. 7 C.F.R. 981.31(a)-(f).

Since 1971, the marketing order has authorized the Almond Board to conduct generic advertising and promotion programs for California almonds. See 36 Fed. Reg. 20,887. The marketing order requires that seven members of the Almond Board concur in any proposal to establish or continue a promotional plan, thereby assuring at least some degree of consensus between representatives of the cooperatives and the independents. 7 C.F.R. 981.40(e). The Almond Board's activities, including its generic advertising and promotion programs, are funded by mandatory assessments on handlers based on the volume of almonds that they handle. See 7 C.F.R. 981.41(a), 981.81(a). As authorized by the AMAA, the marketing order permits an almond handler to receive a credit against a portion of its assessment for conducting its own promotional activities, including paid advertising, provided that those activities meet certain regulatory guidelines.

The almond marketing order has contained different provisions at different times with respect to which promotional expenses may qualify for a credit: The "creditable advertising" provision was in place through the 1992-1993 crop year, and the "credit-back" provision has been in place since the 1993-1994 crop year. See 7 C.F.R. 981.441 (Pet. App. 302a-308a); 7 C.F.R. 981.441 (1992) (Pet. App. 311a-321a). Under the creditable advertising provision, almond handlers were allowed a credit of up to 100% for expenditures on qualifying advertising and sample distribution, although no credit was allowed if the advertising mentioned non-

complementary products or nuts other than almonds. 7 C.F.R. 981.441(c)(3) (1992). The current credit-back provision was designed to give almond handlers more flexibility in the types of promotional activities for which they could receive a credit. See 7 C.F.R. 981.441. Under the credit-back provision, almond handlers are allowed a credit of up to 66 2/3 % for expenditures on 14 categories of promotional and public relations activities, including advertising directed at "end-users" or "trade or industrial users," marketing research, retail in-store promotional activities, coupons, and trade fairs. 7 C.F.R. 981.441(a), (e)(4)(ii)(A) through (M).[1]

3. Petitioners are current or former handlers of California almonds. Pet. App. 12a. They challenged, first at the administrative level and then in federal court, the constitutionality of the generic advertising program established under the almond marketing order, including its creditable and credit-back provisions. See *id.* at 139a.

a. An administrative law judge sustained petitioners' challenge. The Department of Agriculture appealed to the judicial officer, who stayed the matter pending this Court's resolution of *Wileman Brothers*. The judicial officer then relied on *Wileman Brothers* to reject petitioners' challenge. Pet. App. 3a-4a, 139a.

b. Petitioners then filed a complaint in United States District Court for the Eastern District of California pursuant to 7 U.S.C. 608c(15)(B). The district court granted the government's motion to dismiss. Pet. App. 12a-21a.

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[1] The credit-back program also allows for a credit for joint promotion of a complementary product, such as trail mix, in an amount up to the portion of the product that is made up of almonds. 7 C.F.R. 981.441(e)(4)(iii).

c. The court of appeals affirmed. Pet. App. 1a-11a.

The court of appeals concluded that the generic advertising program for California almonds, like the generic advertising programs for California tree fruits in *Wileman Brothers*, is part of a "regulatory scheme" in which the growers' and handlers' "freedom to act independently is already constrained." Pet. App. 6a (quoting *Wileman Bros.*, 521 U.S. at 469). The court therefore concluded that this Court's mode of analysis in *Wileman Brothers* was equally applicable to this case. *Id.* at 5a-6a. The court then proceeded to consider whether the generic advertising program for California almonds exhibits the "[t]hree characteristics" that distinguished the generic advertising programs in *Wileman Brothers* from laws that abridge the freedom of speech.

First, the court of appeals concluded that the generic advertising program for California almonds does not impose a restraint on petitioners' freedom to communicate any message to any audience. Pet. App. 6a-7a; see *Wileman Bros.*, 521 U.S. at 469. The court rejected petitioners' argument that the credit provisions render the generic advertising program in this case more constitutionally suspect than the generic advertising program in *Wileman Brothers*. The court explained that the mere fact that a generic advertising program, or particular features of that program, may reduce the amount that a handler would otherwise spend on its own advertising does not amount to a restriction on speech. Pet. App. 7a.

Second, the court of appeals concluded that the generic advertising program for California almonds does not compel any almond handler to engage in actual or symbolic speech. Pet. App. 8a-9a; see *Wileman Bros.*, 521 U.S. at 469. The court rejected petitioners'

argument that the credit provisions create such compulsion, observing that "[h]andlers can decline to advertise directly and simply pay their assessments." Pet. App. 8a. Indeed, said the court, "[r]ather than supporting [petitioners'] assertion that *Wileman* is distinguishable, the flexibility provided by the creditable and credit-back programs instead supports the conclusion that the assessments here are indeed constitutional," because they "potentially limit the extent to which almond handlers must fund advertising to which they object." *Id.* at 8a-9a.

Finally, the court of appeals concluded that the generic advertising program for California almonds does not require handlers to endorse or finance political or ideological views. Pet. App. 9a-10a; see *Wileman Bros.*, 521 U.S. at 469-470. The court observed that petitioners' "objections to the advertising programs and the assessments imposed thereunder do not appear to be ideological or 'to engender any crisis of conscience.'" Pet. App. 10a (quoting *Wileman Bros.*, 521 U.S. at 472). In any event, said the court, even if petitioners' objections were ideological, the generic advertising program would still be constitutionally permissible, because the messages conveyed by the generic advertisements and the individual advertisements for which handlers may receive credit are "germane to the purposes of the Almond Order and the [AMAA]." Pet. App. 9a. The court found that "there can be no dispute that messages, generic or branded, promoting almond sales are germane to the Almond Order's and the [AMAA's] purpose, which is 'to assist, improve, or promote the marketing, distribution, and consumption' of almonds." *Ibid.* (quoting 7 U.S.C. 608c(6)(I)).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. The court of appeals properly applied the First Amendment principles recently set forth by this Court in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), to a generic advertising program that, while similar to the program in *Wileman Brothers*, is more accommodating of the interests of objecting participants. This Court has previously denied a petition for certiorari that presented the same challenge by some of the same petitioners to the same generic advertising program. *Cal-Almond, Inc.* v. *Department of Agriculture*, 525 U.S. 818 (1998). There is no more reason now than there was two years ago for the Court to grant such a petition.[2]

1. This Court held in *Wileman Brothers* that handlers may, as part of a regulatory scheme for the marketing of an agricultural commodity, be required to fund generic advertising for that commodity. The Court identified three characteristics that distinguish such generic advertising programs from laws that abridge the freedom of speech protected by the First Amendment: (1) the programs "impose no restraint on

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[2] Petitioners do not contend that the decision below conflicts with the decision of any other court of appeals. Petitioners do note (Pet. 26) that two courts of appeals have reached different conclusions with respect to the applicability of the *Wileman Brothers* analysis to so-called "stand-alone" marketing programs. Compare *Goetz* v. *Glickman*, 149 F.3d 1131 (10th Cir. 1998), cert. denied, 525 U.S. 1102 (1999), with *United Foods, Inc.* v. *United States*, 197 F.3d 221 (6th Cir. 1999). That dispute, however, has nothing to do with the issues raised by petitioners, could not be addressed in this case, and does not, therefore, provide a reason to grant the petition.

the freedom of any producer to communicate any message to any audience," (2) the programs "do not compel any person to engage in any actual or symbolic speech," and (3) the programs "do not compel the producers to endorse or to finance any political or ideological views," much less views with which they disagree. *Wileman Bros.*, 521 U.S. at 469-470.

As the court of appeals recognized, the generic advertising program for California almonds is distinguishable, for the same three reasons, from laws that have been held to violate the First Amendment. Indeed, the generic advertising program in this case is even further removed from such unconstitutional laws than were the generic advertising programs in *Wileman Brothers*, because handlers of California almonds, unlike handlers of California tree fruits, may receive a credit against their assessments for their own advertising and promotional activities under rules promulgated by the Secretary of Agriculture. See 7 C.F.R. 981.441 (1999) (Pet. App. 302a-308a); 7 C.F.R. 981.441 (1992) (Pet. App. 311a-321a). In *Wileman Brothers*, three of the dissenting Justices observed that such a credit mechanism, "[o]n its face, at least," would be "a far less restrictive and more precise way to achieve the Government's stated interests [in promoting an agricultural commodity], eliminating as it would much of the burden on [handlers'] speech without diminishing the total amount of advertising for a particular commodity." 521 U.S. at 502 (Souter, J., dissenting) (noting that the AMAA authorizes such credits for, *inter alia*, almonds, although not for tree fruits).

Petitioners nonetheless contend (Pet. 22-25) that such credit mechanisms render the generic advertising program here more constitutionally problematic, in

three respects, than the generic advertising programs in *Wileman Brothers*. Petitioners are mistaken.

First, the almond marketing order does not, as petitioners assert (Pet. 22), "impose a restraint on the freedom of the producer to communicate the message of his choice to the public." A handler is free under the almond marketing order to communicate any message that it chooses. See 7 U.S.C. 608c(10) (no marketing order may "prohibit[], regulat[e], or restrict[] the advertising of any commodity or product"). The marketing order simply limits the types of advertising for which an almond handler may receive a credit against its assessment for the generic advertising program. An almond handler who chooses to engage in advertising that is not eligible for a credit is thus in precisely the same position as *every* fruit handler in *Wileman Brothers*, which involved marketing orders that, as noted above, did not contain any credit mechanism. The Court recognized in *Wileman Brothers* that the mere fact that assessments for generic advertising "may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech." 521 U.S. at 470.

Second, the almond marketing order does not, as petitioners assert (Pet. 24), "compel handlers to engage in actual speech." A handler is free under the marketing order to refrain from engaging in any speech whatsoever. To be sure, such a handler, like *every* handler in *Wileman Brothers*, must pay the full amount of its assessment under the marketing order, without any credit for its own advertising. But *Wileman Brothers* rejected the argument that a requirement to contribute to a generic advertising program constitutes "compelled speech." See 521 U.S. at 470-471 ("The use of assessments to pay for advertising does not require

[handlers] to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message.") (internal quotation marks and citation omitted).[3]

Third, the almond marketing order does not, as petitioners assert (Pet. 24-25), "vest the power to exercise subjective judgments about the content of private speech in a non-neutral decisionmaker," Blue Diamond. Under the marketing order, any almond marketing program, including its credit mechanism, must be approved by at least seven members of the Almond Board. 7 C.F.R. 981.40(e). Neither cooperatives (such as Blue Diamond) nor independents can ever hold more than six seats on the Almond Board. 7 C.F.R. 981.31. More importantly, the final decision concerning marketing programs or credit mechanisms rests not with the Almond Board but with the Secretary of Agriculture,

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[3] Nor do the credit provisions of the almond marketing order even encourage, much less require, any handler to endorse or finance an ideological message. See *Wileman Bros.*, 521 U.S. at 469-470. Those provisions do not distinguish between advertising messages based on their ideological content. See *id.* at 473 (noting that advertising to promote a commodity is not "ideological"). They instead distinguish between advertising messages based on whether, in the view of the Almond Board and ultimately the Secretary of Agriculture, they "promote the sale, consumption or use of California almonds," 7 C.F.R. 981.441(e)(2)—*i.e.*, whether the individual advertising for which the handler seeks a credit is comparable, for purposes of the government's interest in promoting almonds, to the generic advertising for which the handler would otherwise be required to contribute. The credit provisions are thus directly "'germane' to the purpose for which compelled association was justified." *Wileman Bros.*, 521 U.S. at 473.

an impartial decisionmaker. 7 C.F.R. 981.441(f). Cf. *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 308 (1986) (finding a procedure inadequate that vested the union, an interested party, with sole control over complaints that agency fees were used to fund ideological speech).

2. Petitioners also contend (Pet. 20) that the almond marketing order imposes a "content-based financial burden on commercial speech," and thus should be evaluated not under *Wileman Brothers*, but instead under the three-part test announced in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 564 (1980). As *Wileman Brothers* made clear, however, *Central Hudson*, a case involving *restrictions* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech under a "collective action program." *Wileman Bros.*, 521 U.S. at 474 (observing that "the *Central Hudson* test is inconsistent with the very nature and purpose" of such programs); see also *id.* at 469 & n.12 (explaining that such programs are distinguishable from the regulation at issue in *Central Hudson* because they "impose no restraint on the freedom of any producer to communicate any message to any audience").[4] The mere fact that petitioners,

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[4] Petitioners thus err in asserting that "the decision below conflicts with this Court's holdings" in cases such as *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Central Hudson* itself. Pet. 17, 19 (capitalization omitted). Those cases involved a complete ban on a variety of commercial speech, either generally or in a particular context. The almond marketing order, in contrast, imposes no restriction whatsoever on the commercial speech in which handlers may engage.

unlike the handlers in *Wileman Brothers*, may satisfy their "compelled funding" obligation either by paying the full assessment or by engaging in their own creditable advertising does not bring this case within the reach of *Central Hudson* or other cases finding content-based restrictions on speech to be unconstitutional.[5]

3. The Court has had two previous opportunities to consider, on the merits, the applicability of *Wileman Brothers* to the almond marketing order. The Court declined both opportunities.

a. In 1996, the Secretary of Agriculture filed a petition for a writ of certiorari in *United States Department of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879 (*Cal-Almond I*), which challenged the Ninth Circuit's earlier decision that the almond marketing order violated the First Amendment under the *Central Hudson* standard. See *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 14 F.3d 429 (1993), opinion after remand, 67 F.3d 874 (9th Cir. 1995), cert. denied, 519 U.S.

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[5] The dissenting Justices in *Wileman Brothers* surely understood that any marketing order that gave handlers credit for their own advertising could permissibly be content-based. Otherwise, a business that handled almonds and multiple other commodities could receive a credit against its assessment under the almond marketing order for its advertising of all of those commodities, whether or not the advertising had anything to do with almonds. Such a content-neutral credit, which is the only sort of credit that petitioners' theory would permit, would not serve the governmental interest, underlying the marketing order, of promoting a particular commodity. Cf. *Wileman Bros.*, 521 U.S. at 502 (Souter, J., dissenting) (explaining that credit mechanisms, such as that authorized under the AMAA for almonds, "achieve the Government's stated interests," because they do not "diminish[] the total amount of advertising *for a particular commodity*") (emphasis added).

819 (1996). The Secretary explained that a similar First Amendment issue was already pending before the Court in *Wileman Brothers*, which "provide[d] a more appropriate vehicle for resolution of [that] issue," and therefore asked the Court to hold the petition in *Cal-Almond I* while considering the petition in *Wileman Brothers*. Pet. at 16-17, *Cal-Almond I*, *supra*.

On June 27, 1997, two days after the Court issued its decision in *Wileman Brothers*, the Court granted the Secretary's petition in *Cal-Almond I*, vacated the Ninth Circuit's judgment, and remanded the case to the Ninth Circuit "for further consideration in light of [*Wileman Brothers*]." *Department of Agriculture* v. *Cal-Almond, Inc.*, 521 U.S. 1113, 1113-1114 (1997). The remand order suggests that the Court understood that the constitutionality of the almond marketing order, including its credit mechanism, is governed by *Wileman Brothers*, not *Central Hudson*.

b. In 1998, after the Ninth Circuit, citing *Wileman Brothers*, remanded the case to the district court with instructions to dismiss the First Amendment claim, various almond handlers, including some of the petitioners here, petitioned for a writ of certiorari in *Cal-Almond, Inc.* v. *United States Department of Agriculture*, No. 97-1935 (*Cal-Almond II*). That petition argued, as does the petition in this case, that the almond marketing order is distinguishable from the marketing orders in *Wileman Brothers* because an almond handler, unlike the handlers of tree fruits in *Wileman Brothers*, may receive a credit against its assessment for certain advertising of its own.[6] The Court denied the petition. *Cal-Almond II*, 525 U.S. 818

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[6] The earlier *Cal-Almond* case involved only the credit provision that was in effect before the 1993-1994 crop year.

(1998). No intervening decision of this Court or any court of appeals provides any reason to do otherwise here.

4. Finally, petitioners' challenge to the almond marketing order implicates no issue of general significance. That challenge is predicated solely on availability of a mechanism, which was not available in *Wileman Brothers*, whereby a handler may receive a credit against its assessment for its own advertising. Although the AMAA and three marketing orders authorize the Secretary of Agriculture to implement credit mechanisms for certain other commodities,[7] we have been informed by the Department of Agriculture that no credit mechanism is actually in effect (or has been in effect in recent years) for any other commodity. Accordingly, if the Court were to grant the petition for certiorari in this case, the Court's decision on the merits would have no tangible effect outside the California almond industry.

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[7] See 7 U.S.C. 608c(6)(I); see also 7 C.F.R. 932.45(a)(2) ("The committee, with the approval of the Secretary, *may* provide for crediting a portion of a [California olive] handler's direct expenditures for paid brand advertising for olives.") (emphasis added); 7 C.F.R. 982.58 (hazelnuts or filberts grown in Oregon or Washington); 7 C.F.R. 989.53(b) (California raisins).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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